In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 183

HENRY ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1965, a grand jury of the Southern District of California issued a three count indictment charging petitioner with wilfully attempting to evade income taxes in the amount of $52,206.39 in 1958, $77,182.73 in 1959, and $115,497.70 in 1960 (see 1 R. 2-5).[1] The district court, sitting without a jury, found peti-

[1] Vol. 1 of the record in this Court is the district court clerk's record containing the pleadings. Vol. 2 consists of the proceedings in the court of appeals. Vols. 3, 4 and 5 are the transcript of the the proceedings at the trial.

tioner guilty on all counts. He was sentenced to pay a fine of $30,000, and to serve 6 months imprisonment followed by 3 years probation (1 R. 27; 5 R. 651-653).

Petitioner is a certified public accountant, and was an attorney in Germany until he fled the Hitler regime. Beginning in 1949, he prosecuted on behalf of refugees war crimes compensation claims against the German government (3 R. 67, 213).

From 1950 through 1956 petitioner reported as income for federal tax purposes contingent fees earned through such claims work (3 R. 211). From 1957 through 1960, he reported no income from these sources. The United States charged that an analysis of petitioner's bank deposits demonstrated unreported gross receipts of $112,299.70 in 1958, $125,850.00 in 1959, and $159,250.00 in 1960 (4 R. 323-325).

At trial petitioner stipulated "that such amounts were received by" him, but denied that "such monies were in fact 'income' or 'taxable income' " (3 R. 126-127). Petitioner also agreed that the money consisted of unreported fees received for prosecuting claims in Germany (3 R. 210-212)—the source claimed by the government. In these circumstances petitioner's attack on the bank deposit method used to compute the amount received is an academic exercise.

But even were the posture of the case otherwise, there would be no merit to petitioner's claim that the government should have used his "client accounting cards" rather than bank deposits as a basis for com-

putation. In the years in question, petitioner did not report the receipts shown on these cards and therefore the cards could not be said to reflect the basis for petitioner's own computation of his income. See Section 446(a) of the 1954 Code. Compare *Holland* v. *United States*, 348 U.S. 121, 130-132, discussing the comparable Section 41 of the 1939 Code. The existence of the client cards was indeed not disclosed to the Internal Revenue agents until two years after the investigation of petitioner's tax returns commenced (4 R. 274, 350-352). As the trial judge observed, the record "raises the inference that the books and records were withheld from the agents, deliberately withheld" (5 R. 490). The judge found the records that were furnished so inadequate as to require the bank deposits method (5 R. 485).[2] This then was clearly a case where it was necessary to use such a method as "legal evidence available to [the government] * * * in determining whether the story told by the taxpayer's books accurately reflects his financial history." *Holland* v. *United States*, *supra* at 132.

Petitioner asserts as an issue, but does not argue, that there was insufficient evidence to prove that his conduct was wilful. Wilfulness may be inferred from a variety of circumstances, generally "any conduct, the likely effect of which would be to mislead

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[2] Although petitioner's sole witness, his nephew, testified to the existence of the client cards (5 R. 463-464), the record is notably devoid of any assertion that the cards would have shown less income than the government's computations.

or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499.

Petitioner not only attempted to conceal the client cards that set forth his total receipts. He as well falsely denied during the investigation that he had bank accounts in Berlin (4 R. 281-283, 287-288, 296, 300, 310-311), and that he had used corresponding attorneys in Germany (4 R. 296, 298). When two such accounts were found, he conceded they were fees based on war claims, deposited to his account by corresponding attorneys (4 R. 311-314).

Additional evidence of wilfulness is found in petitioner's attempts to explain his failure to report his war claims fees. Although he claimed to have believed that the German government might later tax these funds (3 R. 212), the evidence showed that he had never filed a German tax return (4 R. 420-421), that he never claimed refunds of United States taxes by reason of any alleged German tax liability for the years 1950 through 1956 (4 R. 302), and that no German tax applied (4 R. 394). Petitioner also asserted an obligation to return part of the fees because the German government had countermanded certain awards (4 R. 277-278), but he never produced a promised list of countermanded claims (4 R. 278, 280), and the evidence showed that not a single client was compelled to return an award to the German government during the 3 years in question (4 R. 424-425).

On this record it was proper for the district court to find that the government had proved petitioner's guilt beyond a reasonable doubt. No error has been demonstrated; the case has no significance beyond its peculiar facts.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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